

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RENETTO, LLC,)	
)	
)	
Plaintiff,)	Civil No. 07-789
)	
VS.)	November 2, 2007
)	
PROFESSIONAL SALES AND MARKETING)	
GROUP, LLC,)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: OBER KALE GRIMES & SHRIVER
BY: ANTHONY VITTORIA, ESQ.

FOR THE DEFENDANT: POLSINELLI SHALTON WELTE SUELHAUS
BY: WILLIAM BLAKELY, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
U.S. District Court
401 Courthouse Square, 5th Floor
Alexandria, VA 22314

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1 (Thereupon, the following was heard in open
2 court at 12:02 p.m.)

3 THE CLERK: Civil action 07-789, Renetto
4 versus Professional Sales and Marketing Group.

5 MR. VITTORIA: Good afternoon, Your Honor.
6 Anthony Vittoria on behalf of Renetto, LLC.

7 THE COURT: Good afternoon.

8 MR. BLAKELY: Good afternoon, Your Honor.
9 William Blakely on behalf of Professional Sales and
10 Marketing.

11 THE COURT: Good afternoon.

12 I'm ready.

13 MR. BLAKELY: Yes, thank you, Your Honor.
14 May it please the Court, the issue here today is whether
15 or not the First Filed Doctrine should be applied and this
16 case be dismissed and/or transferred back to the Northern
17 District of Illinois where the same claims that are before
18 this Court are already being litigated.

19 And the second issue and related issue is
20 whether or not there's personal jurisdiction over this
21 defendant, Professional Sales. And we submit, Your Honor,
22 that the answer is no. No, because one, they're not
23 sufficient minimum contacts. And two, that in order for
24 there to be personal jurisdiction this case that would be
25 in violation of due process because there was no

1 purposeful intention to do anything in the Commonwealth of
2 Virginia by this defendant.

3 And, I would like to first address the issue
4 of the First Filed Doctrine, Your Honor. This case was
5 initially filed by the defendant, and I'll just refer to
6 it as Professional Sales and PSM. They filed in Cook
7 County in Illinois.

8 Now that case was removed and I believe
9 properly removed by Renetto to Northern District of
10 Illinois. That occurred, the removal date, I have that
11 here.

12 THE COURT: Well, that's when it gets
13 interesting. And I'm trying to figure out what was the
14 status of the case at the time the Virginia suit was
15 filed. Hadn't the judge in Illinois dismiss the case?

16 MR. BLAKELY: Well, what he did, first it
17 was removed and then sua sponte he entered an order that
18 did a number of things. We've attached that order here in
19 our pleading.

20 And the Court ordered the parties, one, to
21 exhaust settlement of possibilities; two, to file a joint
22 status report by August 20th; and then three, he entered a
23 conditional dismissal order by noting that the state court
24 complaint is dismissed without prejudice to the filing of
25 an appropriate amended federal complaint.

1 THE COURT: So, it was dismissed, huh?

2 MR. BLAKELY: Well, it was conditionally
3 dismissed, Your Honor. What happened it was just --

4 THE COURT: Conditionally pregnant? It was
5 either dismissed or wasn't, wasn't it? It was dismissed,
6 right?

7 MR. BLAKELY: I'm just saying there was a
8 continuing existence of jurisdiction by that court. The
9 parties had to, one, engage in settlement. They had to
10 file papers with the court. And --

11 THE COURT: They could have walked away,
12 couldn't they?

13 MR. BLAKELY: I'm sorry.

14 THE COURT: The plaintiff could have walked
15 away, couldn't they? They didn't have to refile.

16 MR. BLAKELY: In this case, I don't believe
17 they could have, Your Honor. I believe they would have
18 had to report back to the court.

19 There was a court -- they had to file
20 actually a joint status report by order of court of
21 eight -- and it was to be returned on 8-20.

22 I mean, I don't believe -- and by the way,
23 Your Honor, they entered then. They filed a motion to
24 amend the complaint. It was not a new complaint that was
25 filed, not a new number order. They filed an amended

1 complaint because this Court continued to have
2 jurisdiction over the parties.

3 And what happened is that as soon as --
4 apparently Renetto believed that there was not going to be
5 a settlement. He raced up to Virginia and filed a
6 complaint here. And now that we have this Northern
7 District of Illinois, there's been an amended complaint
8 filed, then an answer filed. They have set down a
9 discovery schedule, and I believe discovery ends on
10 April 30th.

11 So, we have that, you know, sort of unusual
12 situation where there was a -- what I refer to -- my
13 words, Your Honor, not in the order -- but conditional
14 dismissal. But the Court didn't just dismiss the case
15 because they ordered the parties to do a number of things
16 and report back to the Court and to make Court filings.

17 So, to respond to your point, Your Honor, I
18 don't believe they could have just walked away without at
19 least being in violation of the Court.

20 And I want to add one other things that's
21 important. The Court ordered -- and I believe this is a
22 quote, the Court ordered the parties to quote, "exhaust
23 all settlement possibilities before any pleadings are
24 filed".

25 So, what happened is they were caught in the

1 unique position of not being able to amend the complaint
2 which is really what they were trying to do because they
3 had a state court complaint and they would have to make it
4 compliant with the federal rules.

5 But the Court ordered them not to -- not to
6 file any pleading until they had exhausted settlement.
7 Then they had to report to the Court on that settlement
8 and then they had to file a joint status report by
9 August 20th.

10 And before that on I believe it was
11 August 9th, Renetto, after having had some settlement
12 discussions -- that wasn't there. I don't know, but had
13 settlement discussions. They declared settlement
14 apparently over and filed this complaint in this court.

15 THE COURT: All right. Well, so I
16 understand it, to be clear, your argument about first file
17 is the case started in Illinois and is still going in
18 Illinois and ought to go to Illinois.

19 MR. BLAKELY: That's true.

20 THE COURT: I understand that argument.

21 MR. BLAKELY: And secondly, the other point
22 I'd like to make, Your Honor, is the personal jurisdiction
23 argument.

24 Number one, there was nothing that was
25 directed by the defendant in this case into the

1 Commonwealth of Virginia except I believe that there were
2 initially one and I think perhaps two follow-up phone
3 calls that were made at the suggestion of Renetto to call
4 another party Swimways and by the way, Swimways is a party
5 that is in the litigation in Illinois as a -- as a
6 co-defendant with Renetto.

7 And so there was nothing -- this case
8 involves, Your Honor, these Canopy Chairs. I don't mean
9 to go into the facts too much because I don't know that
10 it's that pertinent.

11 But the point is that our client actually
12 helped market these Canopy Chairs that were designed by
13 Renetto.

14 THE COURT: So your job was to sell the
15 Canopy Chairs?

16 MR. BLAKELY: That's exactly correct.

17 THE COURT: And, did you sell the Canopy
18 Chairs to Target and to companies that do business in
19 Virginia?

20 MR. BLAKELY: What happened was, Your Honor,
21 there were agreements to sell those products. They went
22 to various companies, but nothing -- they indicated in
23 their brief that they were Virginia distributors. That is
24 not correct. What they were, they were national chains.
25 Apparently they have some distribution points in this

1 Commonwealth. But, there was nothing that was purposely
2 directed as the citations refer to.

3 THE COURT: Well, help me with that. I
4 understand what purposeful availment means and I think you
5 do too. But my question is in today's global economy, a
6 company that manufacturers Canopy Chairs does not want to
7 just sell them in Illinois because there are not that many
8 beaches in Illinois. You want to sell them in Virginia
9 Beach and North Carolina and South Carolina as well. Is
10 that right?

11 MR. BLAKELY: Your Honor, what they did is
12 they sold them to I believe --

13 THE COURT: No, my question was very
14 precise. You're a national -- you're selling a product
15 that you want to market in Virginia, North Carolina, South
16 Carolina and Florida, any place that has a beach, right?
17 It's a Canopy Chair, right?

18 MR. BLAKELY: I think that was up to the
19 party we sold them to.

20 THE COURT: No, no. Come on. Come on.
21 Come on. If you sell it to Walmart or you sell it to
22 Target and you know the Target is in Virginia, you want to
23 sell chairs, right? And you earn a fee when chairs are
24 sold to that national chain, don't you?

25 MR. BLAKELY: You want to sell chairs to

1 that chain, but there is not --

2 THE COURT: So, then like International Shoe
3 then when you put these chairs into commerce in Virginia,
4 you're doing business here, aren't you?

5 MR. BLAKELY: Yes, but you refer to --

6 THE COURT: Is that yes or no? You didn't
7 answer that question. Did you answer yes?

8 MR. BLAKELY: Better ask me the question
9 again, Your Honor.

10 THE COURT: My question was if you put into
11 the stream of commerce these chairs to -- I don't want to
12 use the Walmart. Let's say Target. And Target is in the
13 Eastern District of Virginia and you know those chairs are
14 going to be sold here, is that purposeful availment for
15 purposes of the Long-arm Statute?

16 MR. BLAKELY: I don't believe it is, Your
17 Honor.

18 THE COURT: Why not?

19 MR. BLAKELY: I think you have to have an
20 intent to direct it into the Commonwealth. There was a
21 case, the case involving the tire and the inner tube
22 tires. I believe it was --

23 THE COURT: Kumho Tires?

24 MR. BLAKELY: And there, yes, tires are
25 distributed to various districts, various states. But you

1 have to have a purposeful intent to direct your activities
2 into the Commonwealth.

3 In this particular case, there was no
4 contact with the Commonwealth except for I believe there
5 were three phone calls to Swimways.

6 It is apparently true that I believe Sears
7 and a couple of other of these groups that were
8 distributors have -- have distributed some of these -- of
9 Canopy Chairs into the Commonwealth. But that was not
10 Professional Sales that did that. They weren't directing
11 them into the Commonwealth and I believe that's what's
12 required, Your Honor.

13 THE COURT: Okay.

14 MR. BLAKELY: So, in summary, I'll just
15 conclude that there are really three reasons. One,
16 there's a very active case right now pending in the
17 Northern District of Illinois.

18 Your Honor, I want to also note that the
19 answer that was filed there I believe that what we have in
20 this case is a mandatory counterclaim in Northern District
21 of Illinois. And in this particular case, the claims that
22 have been asserted by Renetto, the response, if there's
23 going to be one through an answer by Professional Sales,
24 will mandate that we will have to file a mandatory
25 counterclaim back against -- or compulsive counterclaim

1 back against the plaintiff, and it will be the same basic
2 lawsuit that we have in the Northern District of Illinois.

3 It is a clear -- I believe the jurisdiction
4 clearly was asserted by the defendant in this action,
5 Professional Sales, as a plaintiff in the Northern
6 District of Illinois. That's where I submit the proper
7 jurisdiction for this case is, and I request the Court
8 honorably to please transfer the case back to Illinois or
9 dismiss it. Thank you.

10 THE COURT: Thank you.

11 MR. VITTORIA: Good afternoon, Your Honor.
12 Anthony Vittoria on behalf of plaintiff, Renetto.

13 THE COURT: Good afternoon.

14 MR. VITTORIA: I think the Court's hit the
15 head about the conditionally or partially pregnant or
16 partially dismissed.

17 In fact, I think the defendant has gone a
18 great way in mischaracterizing the line order of the
19 federal court in Illinois. It wasn't an order. It was
20 just a statement. There was nothing that the parties had
21 to do.

22 This suit is dismissed without prejudice to
23 the filing of an appropriate amended federal complaint or
24 timely motion to remand.

25 The plaintiff in that case, PSM, had the

1 option of filing an amended complaint or filing a motion
2 to remand.

3 The parties are also requested, not ordered,
4 requested to fully exhaust all settlement possibilities
5 for this dispute prior to filing any further pleadings.
6 They're requested. They were not ordered.

7 We were not ordered to go to settlement
8 negotiations. If PSM wanted to file an amended complaint,
9 if they wanted to file a motion to remand, we were
10 requested to go to settlement negotiations. We were not
11 ordered. And the parties were then to file a joint status
12 report by August 20, 2007.

13 I submit, Your Honor, the Court isn't going
14 to track down PSM and sanction them for failing to file a
15 status report for this case that's already been dismissed.

16 And as further evidence that the case was
17 dismissed, Your Honor, I have here the electronic filing
18 receipts that you get for filing electronic documents. I
19 printed out a couple of them.

20 PSM's counsel filed a couple of attorney
21 appearances in the case on August 17th of 2007. One for
22 Carina Segalini, another for Anthony Nasharr and it
23 provides the name of the case, the case number, file of
24 Professional Sales and Marketing Group, Inc. And
25 underneath it in bold all caps, warning, colon, case

1 closed on 10-17-2007.

2 This case was closed, Your Honor. It was
3 not active. There was no promise this case was going to
4 be revived by PSM.

5 Accordingly, Renetto had its own claims. It
6 is really based in Columbia, Maryland. A lot of its
7 critical witnesses are located here in the Eastern
8 District of Virginia. It's a very convenient forum. It's
9 a very quick forum, Your Honor. Our witnesses are here.
10 They're subject to subpoena here, so we filed in the
11 Eastern District of Virginia to have our case, our claims
12 adjudicated.

13 So, accordingly, Your Honor --

14 THE COURT: Well, is there personal
15 jurisdiction here? Counsel says that the company does not
16 do business here, does not sell here. It may have sold to
17 national chains, but didn't intend to sell in Virginia.

18 MR. VITTORIA: Your Honor, I would
19 respectfully disagree. My understanding of large chains
20 such as Target and Walmart, their national offices are --
21 in the case of Target is in Minnesota. The national chain
22 for Walmart is in Arkansas.

23 All the products that are sold in the
24 Walmart are not all delivered to Arkansas and then
25 Arkansas deliveries them to all the thousands of different

1 Walmarts.

2 What happens is the particular companies
3 that are wanting to sell through Walmart actually deliver
4 the chairs to the individual locations or whatever the
5 product is, they deliver it to the Walmart in
6 Frederiksberg, Virginia. They deliver to the Walmart in
7 Woodbridge, Virginia. They don't deliver to Arkansas and
8 then Walmart delivers it out.

9 So for those chairs to get into Virginia,
10 it's my understanding that would have to have been
11 delivered by PSM or its manufacturer or somebody on their
12 behalf into this district.

13 So, of course, they were trying to sell
14 chairs here. They might not have thought in Illinois
15 Virginia is our market. We need to go there. We want to
16 sell chairs there. They wanted to sell as the Court
17 correctly pointed out anywhere where they could get a
18 market, and one of those places was in the Eastern
19 District of Virginia because of Virginia Beach, because
20 Ocean City, Maryland is close by, because Nags Head is
21 close by. Because there are ball fields everywhere where
22 people would like to sit in chairs that are in shade.

23 So of course, they directed their attention
24 here.

25 THE COURT: But if this chair collapsed on a

1 person sitting in Virginia Beach, they wouldn't be able to
2 bring a lawsuit against PSM because PSM does not do
3 business in Virginia?

4 MR. VITTORIA: I believe they would be able
5 to bring a lawsuit against PSM, Your Honor.

6 But, I also -- I also wanted to point out
7 that we have a tort claim. We have a tort claim about the
8 intentional interference with business relations and that
9 is related to this phone call made by PSM's officer to
10 Swimways which is located in Richmond, Virginia.

11 And that, Your Honor, that's a tort here.
12 So that's an independent separate grounds for jurisdiction
13 in this court.

14 Now, PSM relies heavily on the New
15 Wellington case. Well, the New Wellington case is
16 inapposite here, Your Honor.

17 That is a case there wasn't even a tort
18 claim alleged. The only grounds that the plaintiff in
19 that case alleged personal jurisdiction was on -- there
20 was a contract claim. But in the argument at the motion
21 to dismiss, the plaintiff said, well, listen, Your Honor,
22 we have a tort claim, and that's another basis for
23 jurisdiction. But, there was no actual tort claim in the
24 complaint.

25 Here we have a tort claim in the complaint.

1 And so, it's been alleged and if -- I think what PSM is
2 really doing is focusing a lot on paragraph four of
3 Renetto's complaint which is the paragraph on
4 jurisdiction.

5 If it pleases the Court, we'll amend that to
6 add an additional statement that jurisdiction is founded
7 in this court based on this tort that occurred in this
8 Commonwealth.

9 But ultimately, that's exalting form over
10 substance, Your Honor. We have a tort that occurred in
11 this jurisdiction in this district. And we also have PSM
12 conducting business in this jurisdiction.

13 So, I don't think that there's any question
14 there's personal jurisdiction here, Your Honor.

15 THE COURT: And you think there's personal
16 jurisdiction because they're transacting business in
17 Virginia by selling the chairs here?

18 MR. VITTORIA: I believe that is one ground.
19 I also believe the --

20 THE COURT: And also the tort grounds in
21 terms of Swimways -- the phone call to Swimways' counsel?

22 MR. VITTORIA: Yes, Your Honor.

23 THE COURT: All right. I think understand
24 your position.

25 MR. VITTORIA: Thank you, Your Honor.

1 MR. BLAKELY: Can I just have a brief
2 moment, Your Honor?

3 THE COURT: Absolutely.

4 MR. BLAKELY: The first point I'd just like
5 to read from the order. It is attachment B, Your Honor,
6 to our reply brief. And the order reads after careful
7 view of the recently removed state court complaint, said
8 complaint, quote, "is dismissed without prejudice to the
9 filing of an appropriate amended federal complaint or a
10 timely motion to remand".

11 And then the judge or the entry continues:
12 "The parties to file a joint status report by 8-20-2007."
13 And that's of course following this discussion that they
14 have to exhaust settlement discussions before they file
15 any amended complaint.

16 So, my point is, Your Honor, and I really do
17 dispute opposing counsel. I believe the parties were
18 obligated to file a status report by the order of that
19 Judge, Judge Cast -- Castillo, excuse me, on August 20,
20 2007.

21 This case was not just summarily dismissed
22 without prejudice and without any further action of the
23 parties. The Court thereby retained jurisdiction over
24 this case, over the actions of the parties and requiring
25 them to respond back to the Northern District of Illinois.

1 The second point I'd like to quote from the
2 Eastern District of Virginia case in the Affinity matter
3 that we cited in our brief. And, there referring to the
4 due process requirement, Your Honor. And it requires the
5 contract must have a substantial connection with the forum
6 state.

7 And in addressing the point that we have
8 discussed here today which is the purposeful direction of
9 activities of the court in this case noted that one, in
10 this case -- in the case that's being cited, the contract
11 was finalized in that case in Alaska. Our case was
12 finalized in I believe it was Illinois and there were
13 discussions overseas that the certain terms were
14 negotiated by telephone between Virginia and Alaska. That
15 didn't happen. There was no contact by telephone other
16 than the contact with this potential third party defendant
17 Swimways.

18 The defendant, and this is what I believe is
19 important, the defendant made no purposeful effort of its
20 own to develop a market in Virginia.

21 And that is what I'm saying in this
22 particular case, Your Honor. And I'll conclude that the
23 defendant in this case did not make any purposeful effort
24 to develop anything into Virginia. Yes, they did enter
25 into a sales agreement with --

1 THE COURT: So, if a Canopy Chair collapsed
2 on a person at Virginia Beach, they could not bring a
3 claim against PSM. Is that right?

4 MR. BLAKELY: I believe that would be right,
5 Your Honor. I believe there would be a challenge to that.
6 That's correct.

7 THE COURT: So in your view, the consumer
8 injured when a Canopy Chair collapsed in Virginia Beach
9 could not bring a claim against PSM because PSM is not
10 doing business in Virginia under the Long-arm Statute. Is
11 that right?

12 MR. BLAKELY: Well, in this particular case,
13 Your Honor --

14 THE COURT: My question is very precise.
15 Could you answer my question.

16 MR. BLAKELY: I think the answer to that is
17 yes.

18 THE COURT: That they could?

19 MR. BLAKELY: I think they could not.

20 THE COURT: Okay.

21 MR. BLAKELY: I think they would have to
22 challenge that. Yes, that's correct.

23 THE COURT: Okay. Thank you.

24 This matter is before the Court on the
25 defendant's motion to dismiss for lack of personal

1 jurisdiction and for transfer of venue. And this is a
2 case involving claims brought by Renetto, a Maryland
3 company, alleged inventor of the chair that plan to sell
4 with Swimways, a Virginia corporation, I guess a marketing
5 company which was intending to purchase the right to
6 market the chair and PSM, Professional Sales and Marketing
7 Group.

8 And my reading of the papers suggest that
9 PSM engages in marketing of products and that their goal
10 was to sell this chair and that's what one of the
11 agreements attached demonstrates.

12 And the agreement itself that's been
13 provided, at least in this meeting footnote talks about
14 PSM is authorized to sell the Canopy Chair at its
15 discretion through 2006 calendar year. And it also refers
16 to "will not sell to certain retail without
17 authorization", but there's some indication that the chair
18 has been sold to national retailers, including Target.

19 The legal question is whether there is
20 personal jurisdiction over PSM in Virginia. And in my
21 view, there is personal jurisdiction because PSM is
22 transacting business in Virginia by distributing the
23 Canopy Chairs for sale in national and regional retail
24 chain locations in Virginia and has sufficient contacts
25 with Virginia to satisfy due process.

1 I recognize that the case was filed in
2 Illinois first. However, it appears to me at the time
3 this lawsuit was filed, the Illinois case had been
4 dismissed.

5 The Virginia Long-arm Statute 8.01328.1(a)
6 encompasses anyone who acts directly or by agent as to a
7 cause of action arising from a person's transacting
8 business in this Commonwealth. That's (a)1.

9 And the statute is sufficient to encompass
10 even a single act -- transaction under the English and
11 Smith case.

12 I don't think it's a close call. And again,
13 there's certainly maybe another reading of it. But the
14 cases that I've read suggest that here where you have
15 multiple sales transactions of these chairs through
16 Virginia stores, based upon the contract entered into by
17 PSM with the national retailer that that fulfills the
18 requirements of Virginia Long-arm Statute and I'll cite
19 Anita's New Mexico Style Mexican Food case from the Fourth
20 Circuit in 2000. And also I'll cite the case of LG
21 Electronics and Beverly Hills Fan.

22 All these seem to me to suggest that where
23 you have this national chain, you have this product being
24 sold nationally, and it's here in Virginia that it is
25 sufficient for purposes of demonstrating a transacting

1 business to meet the requirements of the Long-arm Statute.

2 And I also think that if the answer to the
3 question is that a consumer who is on Virginia Beach and
4 this chair collapses on her cannot bring a lawsuit against
5 the company that sold the chair through Target that she
6 purchased in the Target store in Virginia, if that doesn't
7 fall within the Long-arm Statute, then we have a real
8 problem.

9 So for those reasons, I think that the
10 motion to dismiss for lack of personal jurisdiction will
11 be denied. And I'm going to deny the motion to transfer
12 venue because the defendant did not make any showing of
13 what witnesses or proof was in Illinois.

14 He says that there is, but there was no
15 affidavit setting forth any information about which
16 documents are in the Northern District of Illinois, what
17 witnesses are there. And in the absence of some evidence
18 to support that, there is no basis here under 1404 to
19 change venue. So motion to change venue is denied.

20 Thank you.

21 MR. BLAKELY: Thank you, Your Honor.

22 MR. VITTORIA: Thank you, Your Honor.

23 (Proceedings concluded at 12:26 p.m.)

24

25

1
2 CERTIFICATE OF REPORTER
34 I, Renecia Wilson, an official court
5 reporter for the United State District Court of Virginia,
6 Alexandria Division, do hereby certify that I reported by
7 machine shorthand, in my official capacity, the
8 proceedings had upon the motions in the case of Renetto
9 vs. Professional Sales.
1011 I further certify that I was authorized and
12 did report by stenotype the proceedings and evidence in
13 said motions, and that the foregoing pages, numbered 1 to
14 23, inclusive, constitute the official transcript of said
15 proceedings as taken from my shorthand notes.
1617 IN WITNESS WHEREOF, I have hereto
18 subscribed my name this 19th day of November 2007.
1920 _____
21 *Renecia Wilson, RMR, CRR*
22 *Official Court Reporter*
23
24
25